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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

RICHARD S. AURAND,

JOHN WEBB McPHERSON,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT ERR IN NOT OBTAINING A SEARCH WARRANT FOR AN AIRCRAFT THAT HAD LANDED IN PENNSYLVANIA FROM WITHOUT THE TERRITORIAL LIMITS OF THE UNITED STATES, THE CARGO OF WHICH HAD BEEN UNLOADED AND TAKEN AWAY FROM THE AREA, AND WHICH AIRCRAFT HAD BEEN SECURED BY GOVERNMENT OFFICIALS?

ANSWERED IN THE NEGATIVE BY THE DISTRICT COURT AND THE COURT OF APPEALS.

II. WERE THE DEFENDANTS DEPRIVEDOF DUE PROCESS OF LAW WHEN THEY WERE ADJUDGED GUILTY OF IMPORTATION OF MARIJUANA ON THE BASIS OF THE PRESENCE OF RESIDUE OF 2 1/2 TO 5 YEAR OLD MARIJUANA IN AN AIRCRAFT WHICH HAD BEEN PREVIOUSLY OWNED AND OPERATED AS A COMMUTER AIRLINER?

ANSWERED IN THE NEGATIVE BY THE DISTRICT COURT AND THE COURT OF APPEALS.

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IN THE

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RICHARD S. AURAND,

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vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The Sur Petition For Rehearing of the United States Court of Appeals For The Third Circuit is contained in the appendix to this Petition (Pet. App. A1). The Judgment Order of the United States Court of Appeals for The

Third Circuit is unreported. It is contained in the Appendix to this Petition (Pet. App. A2-A3). The Memorandum Opinion and Order of the United States District Court For The Middle District of Pennsylvania is also unreported, but is contained in the Appendix to this Petition (Pet. App. A4-A16).

STATEMENT OF JURISDICTION

I. The United States District Court for the Middle District of Pennsylvania has original jurisdiction of the subject matter (21 U.S.C. §952 and 963) of the within appeal pursuant to Section 3231 of Title 18 of the United States Code.

II. It is hereby certified that the instant appeal is from a final judgment of the United States District Court for the Middle District of Pennsylvania. The Court of Appeals for the Third Circuit has jurisdiction pursuant to Section 1291 of Title 28 of the United States Code.

III. The United States Supreme Court has jurisdiction pursuant to Section 1254 of Title 28 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution, Fourth Amendment.

2. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Fourteenth Amendment.

ORDERS IN QUESTION

1. "AND NOW, this 31st day of August, 1984, in accordance with the accompanying memorandum, IT IS HEREBY ORDERED that Defendants' post-trial motion for a new trial is denied" per the Honorable R. Dixon Herman captioned in the United States District Court for the Middle District of Pennsylvania at Nos. 83-00198-01 (Richard S. Aurand) and 84-0002 (John Webb McPherson).

2. "...the petition for rehearing is denied," by the United States Court of Appeals for the Third Circuit on April 22, 1985, captioned at No. 84-5654 (Richard S. Aurand) and No. 85-5655 (John Webb McPherson).

STATEMENT OF THE FACTS

On October 21, 1983, a twin engine Piper Seneca allegedly belonging to the Defendant, McPherson, and piloted by the Defendant, Aurand, was observed some 75 miles Northeast of Great Inauga, without the territorial borders of the United States. Except for a 25 minute hiatus in observation in the area of the Bahamas, the Seneca was kept under constant surveillance by two Customs Citations jets until it landed in Brogue, Pennsylvania. The Seneca had neither filed a flight plan nor cleared Customs when it crossed the United States border, however, there was no evidence as to the point of departure or that the aircraft had landed outside the United States. While observing activity on the ground, the occupants of the Citations indicated that they observed the

Seneca being unloaded and that there were three to four individuals at the scene and two vehicles. The vehicles departed and one of the Citations attempted to follow one - a van. The van was later lost by the aircrafts' observers in some woods. A State Police trooper arrived shortly thereafter and secured the aircraft. Customs officials then arrived and conducted a search of the aircraft which eventually netted, inter alia, small amounts of marijuana debris from the cabin and the nose cone, marijuana residue which later proved to be 2 to 5 years old. No warrant was obtained for the search. Both McPherson and Aurand were seen by witnesses at the time the Seneca landed at Baublitz but there was no testimony as to what the cargo consisted of.

The Seneca had been purchased some five months before by the Defendant, McPherson

from one Henry Weber. Mr. Weber indicated that the plane had been a commuter airplane, had not been cleaned prior to the sale and had had previous owners. The sale to McPherson was completed almost immediately after Weber had obtained the aircraft from Tischel Air Services.

The Defendants were charged with violations of federal law and prosecuted pursuant to Section 3231 of Title 18 of the United States Code. Based on the foregoing facts, the District Court held that the search of the aircraft without a warrant was legal and a jury determined that the evidence was sufficient to prove the Defendants guilty beyond a reasonable doubt of importation of marijuana.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT

I. THE SEARCH OF THE AIRCRAFT WAS UNREASONABLE AND NOT JUSTIFIED BY ANY EXIGENT CIRCUMSTANCES NOR WAS IT A LEGITIMATE BORDER SEARCH. THE JUSTIFICATION FOR BORDER SEARCHES HAS BEEN VARIOUSLY AND CONFLICTINGLY DEFINED BY THE UNITED STATES SUPREME COURT AND THE FEDERAL COURTS OF APPEALS THUS CREATING A NEED FOR SUPERVISION AND UNIFORMITY.

It is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions. Mincey v. Arizona, 437 US 385, 390, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978), citing Katz v. United States, 389 US 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967). The warrant requirement is crucial to

protecting Fourth Amendment rights because of the importance of having the probable-cause determination made in the first instance by a neutral and detached magistrate.

> "The point of the Fourth Amendemnt, which often is not grasped by zealous officers, is not that it denied law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Johnson v. United States, supra. at 13-14, 92L.Ed. 436, 68 S.Ct. 367. See also Marshall v. Barlow's Inc., 436 US 307, 323, 56 L.Ed.2d 305, 98 S.Ct. 1816 (1978); United States v. United States District Court, supra, at 321, 32 L.Ed.2d 752, 92 S.Ct. 2125. The safeguards embodied in the warrant requirement apply as forcefully to automobile searches as to any other."

The cases do recognize a narrow exception to the warrant requirement for certain automobile searches. Two major considerations have been advanced to justify the automobile

exception to the warrant requirement. First, these searches have been justified on the basis of the exigency of the mobility of the automobile. See e.g., Chambers v. Maroney, 399 US 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970); Carroll v. United States, 267 US 132 69 L.Ed 543, 45 S.Ct. 280 (1925). The inherent mobility of the vehicle often creates situations in which the police's only alternative to an immediate search may be to release the automobile from their possession. This alternative creates an unacceptably high risk of losing the contents of the vehicle, and is a principal basis for the Court's automobile exception to the warrant requirement. See Chambers, supra, at 51 n 9, 26 L.Ed.2d 419, 90 S.Ct. (1975). The second major justification for the automobile exception is the diminished expectation of privacy in an automobile.

Because an automobile presents much of its contents in open view to police officers who legitimately stop it on a public way, is used for travel, and is subject to significant government regulation, this Court has determined that the intrusion of a warrantless search of an automobile is constitutionally less significant than a warrantless search of more private areas. See Arkansas v. Sanders, 442 US 753, 761 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979).

The case law with respect to automobiles is instructive in the instant situation. An aircraft possesses the mobility of a vehicle, but not to so great an extent. Nor is the reasonable expectation of privacy sacrificed to public scrutiny in an aircraft to the extent it is in a vehicle. As in all cases, a full examination of the facts will be required

to determine whether or not probable cause existed and whether or not the situation was such as to do away with the necessity of obtaining a search warrant. Viewed in a light most favorable to the government, the officers knew that a plan had been traced from without the borders of the United States and tracked via ground radar and air surveillance to an airfield in Pennsylvania. Government officials from federal, county and state offices responded to the airfield a short time after it landed to find no one present. The plane was secure and numerous officers were on hand to prevent its departure. Observations made from the air indicated that the cargo had been removed and there was, therefore, no possibility of evidence being destroyed. Under the totality of the circumstances, there was nothing to justify the immediate search of the aircraft and any evidence discovered as a result thereof must

be suppressed.

The government might argue that this was a "border search" and, as such, not subject to the restrictions of the Fourth Amendment. A similar factual situation was addressed in United States v. Caraway, 474 F.2d 25 (1973), in which the Court held that:

> "That power held by customs officials, although enabling 'mere suspicion'--based searches, does not obviate the necessity of compliance with the constitutional standard of reasonableness. Boyd v. United States, 1886, 116 U.S. 616, 623, 6 S.Ct. 524, 29 L.Ed. 746; Morales v. United States, 5 Cir. 1967, 378 F.2d 187."

The Court further held that customs officials cannot give unreasonable elasticity to the border concept and reiterated the requirements of the Fourth Amendment. The factual circumstances in Caraway are virtually on all fours with the instant case as noted by the Court:

:....Customs officials made a full explor-

> search of Scales' boat without a warrant. Yet there was no danger that the suspect vehicle would escape from the jurisdiction. Chambers v. Maroney, 399 U.S. 42, 26 L.Ed. 2d 419 (1970). Nor did customs agents possess any reliable information suggesting the necessity of an immediate search ..."

The United States Supreme Court has variously defined the circumstances and justification for permitting a warrantless search in border search situations. To use only several examples, it was held in Arkansas v. Sanders, 442 US 753, 61 L.Ed.2d 253, that personal property brought into the United States may be searched at the border under circumstances that would not otherwise justify a warrantless search. In United States v. Ramsey, 431 US 606, 52 L.Ed.2d 617 (1972), the Court held that a customs official was justified in conducting a search without a warrant where he had "reasonable cause to suspect." And in United States v. Cortez, US , 66

L.Ed.2d 621, a totality of the circumstances standard was used to determine if the Border Patrol Agent had a "particularized objective bases" for suspecting the Defendant of criminal activity. Finally, in Almeida Sanchez v. United States, 413 U.S. 266, 37 L.Ed.2d 596 (1973), the Court held that neither warrant nor any level of suspicion is required to search vehicles, persons or goods arriving in the United States. Since the aforementioned cases are simply a random sampling of decisions of the United States Supreme Court on this issue, it becomes patently obvious that consideration by the Court is necessary to secure and maintain uniformity.

So, too, are the various Courts of Appeals in conflict. The instant decision is contrary to the decisions in United States v. Bachner, (1983, CA 11 Fla) 706 F.2d 1121, cert. den. (US)

78 L.Ed.2d 235 (nether a warrant nor any level of suspicion is required); United States v. King, (CA 10 NM) 485 F.2d 353 (not dependent upon probable cause); United States v. Grayson, (CA 9 CAL) 597 F.2d (search reasonable under a "no suspicion" standard, or a "mere suspicion" standard); United States v. Burkeen, (CA 6 Tenn. 1965) 350 F.2d 261 (all persons coming into the United States liable to detention and search by authorized governmental officers); United States v. Hill, (CA 5 Fla. 1970) 430 F.2d 129 (reasonable suspicion of a customs agent); United States v. Harper, (1980, CA 4 NC) 617 F.2d 35 (searches at established border check-point are reasonable per se); United States v. Stornini, (CA 1 Puerto Rico 1971) 443 F.2d 833 (customs officer may search on a random basis); United States v. Beck, (CA 3 Pa. 1973) 483 F.2d 203 (determination dependent upon the particular

facts of each case); United States v. Aulet, (1980, CA 1 NY) 618 F.2d 182 (reasonableness determined by weighing the warranted suspicion of the border official against the offensiveness of the intrusion); United States v. Walters, (CA 5 Fla. 1979) 591 F.2d 1195 (border search require a less demanding degree of justification than domestic search). Totality of the circumstances, consent, and probable cause standards also abound in Court of Appeals cases. For example, although reasonable suspicion is sufficient to justify stop by roving border patrol officers, any further detention or search must be based on consent or probable cause. United States v. Saenz, (CA5 Tex) 578 F.2d 643, cert. den. 439 U.S. 1075, 59 L.Ed.2d 42, 99 S.Ct. 850. Thus, there is a plethora of conflicting standards, which your Honorable Court, in its supervisory powers, must resolve.

Assuming, arguendo, that the airport in Brogue was the functional equivalent of a border, a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on "unreasonable seizures". United States v. Place, 462 U.S. ___, 77 L.Ed. 2d 110 (1983). There the Court examines the exception to the probable case requirement for limited seizures of the person recognized in Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 (1968), and held that the principles of Terryapply to seizures of property and tha the prolonged seizure of Defendant's baggage went far beyond a mere investigative stop and amounted to a violation of his Fourth Amendment rights. United States v. Place, supra. As in all exceptions to the probable cause requirement recognized in Terry, it rests on a balancing of the competing

interests to determine the reasonableness of the type of seizure involved within the meaning of the Fourth Amendment's general prescription against unreasonable searches and seizures. As the Court stated:

> "We must balance the nature and quality of the intrusion on the individual's Fourth Amendment's interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment's interest, the opposing law enforcement interests can support a seizure based on less than probable cause."

As in Place, in border searches, we are also dealing with a balancing of interests. A distinction must also be noted between the right to make a search and the nature and extent of the search that may be made under the circumstances. Although the authorities are relatively unclear as to what was the basis for a border search, if the search of a perons's vehicle or baggage leads to the search of his person, it seems that something more is required.

It has been held that to justify a search of body cavities there must be a "clear indication" or "plain suggestion" of smuggling and that mere suspicion is not enough. Rivas vs. United States, 368 F.2d.703 (CA 9 CAL 1966) cert. den. 386 U.S. 945 17 L.Ed2d 875. Thus, yet another standard of proof for searches lawful at the outset. In the instant case, it is respectfully submitted that, even assuming the validity of the border search concept, the search in this case extended beyond permissible limits.

II. THE DEFENDANTS WERE DENIED DUE PROCESS OF LAW AS A RESULT OF BEING CONVICTED OF IMPORTATION OFMARIJUANA BY EVIDENCE OF THE PRESENCE OF RESIDUE OF MARIJUANA IN THE AIRCRAFT, WHICH RESIDUE WAS OPINED TO BE 2 TO 5 YEARS OLD.

Due process of law guarantees respect for those personal immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) or are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). See Rochin v. California, 342 U.S. 165 (1952). Fundamental to the concept of due process is the principle that every person who stands accused of a crime is entitled to a fair and impartial trial. Massey v. Moore, 348 U.S. 105 (1954); Betts

v. Brady, 316 U.S. 455 (1942). Our Courts long ago recognized that an essential ingredient of a fair trial is the presumption of innocence with which an accused is clothed. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895); Comm. v. Mayhugh, 233 Pa. Super. 24 (1975).

It is respectfully submitted that the finding of a small amount of marijuana by government officials is not sufficient evidence to convict the defendants of the violations specified herein or to support the indictment. The government must admit that, although the plane was observed being unloaded, the only evidence of the aircraft containing an illicit substance

was some marijuana residue "no bigger, in terms of volume, than a ball point pen" in the words of Officer Craven at the preliminary hearing. The government would bootstrap the presence of marijuana residue, admittedly no more than that used for personal consumption, into the basis of a prosecution for importation and conspiracy. Surely this "giant leap" is without precedent. Your writer has reviewed that case law dealing with the sufficiency of the evidence in such cases and has had little success in finding similar factual situations. Suffice it to say that there were universally present such additional facts as would warrant prosecution and/or conviction such as a ship heavily laden with marijuana, United States v. Munoz, 681 Fla. 1372 (CA 11 Fla, 1982); letter regarding shipment of heroin in defendant's handwriting along with package containing heroin, United States v.Ogle,

587 Fla 938 (CA 8 Minn 1978); implausible itinerary and large amount of marijuana, United States v. La Froscia, 485 F.2d 451 (CA 2 NY 1973); Defendant entered United States with round trip ticket from Panama and four and one-half (4 1/2) pounds of cocaine, United States v. Restrepo Grande, (CA 5 La 1978); defendant in possession of Columbian-packaged marijuana, United States v. Miller, 589 Fla 1117 (CA 1 Me 1978); fifteen (15) tons of marijuana in bales bearing Spanish markings, United States v. Seni, 662 Fla 277 (CA 4 NC 1981); and eight (8) tons of marijuana, United States v. Tussell, 441 F. Supp. 1092 (CA 3 WDPa 1977).

One might suspect that a plane containing material entered United States territory and landed in Pennsylvania. One might suspect that the Defendant was piloting the aircraft which

was subsequently unloaded. One might suspect that the material was subject to duty. However, on the issue of what the material was and where it came from, one is left to speculate. While it is true that circumstantial evidence, in itself, may be sufficient to establish the commission of a crime and the accused's connection therewith, if the conviction is based wholly on inferences, suspicion and conjecture, it cannot stand. As the Pennsylvania Supreme Court stated in Comm. v. Lang, 470 Pa. 204, 368 A.2d 265 (1977):

> "On the basis of the evidence presented, the jury would have had to guess whether the Defendant committed the crime. As we said in Comm. v. Crews, 436 Pa. 346 260 A.2d 771 (1970): "Our system recoils at sending a man to prison...on a guess.'"

In the instant case, the government's evidence was wholly circumstantial. While the law makes no distinction between direct and circumstantial evidence, this does not do away

with the requirement that the proof be beyond a reasonable doubt. There was no direct testimony that the airplane left U.S. territory, landed in foreign country, picked up an illicit substance and flew back to Brogue, Pennsylvania. Despite references to prior trips to Jamaica and the landing conditions there, there were not witnesses to any such activity. Rather the government rested its case on the Defendants' aircraft having been picked up on radar fifty-seven (57) miles northeast of Great Inagua and having been followed to the destination in York County. While on the ground, certain persons were seen carrying boxes from the plane to other vehicles whereupon the vehicles left the scene and could not be traced. Finally, the government discovered what appeared to be marijuana residue on the floor of the cargo area, in the nose cone and on one wing. Based on this evidence, the

Court allowed the case to go to the jury adjudged the defendants guilty.

Interestingly enough, in the midst of their deliberatons, the jury requested the Court to reinstruct on the issues of direct and circumstantial evidence and asked that the Court again define the "circumstantial ladder". It was, therefore, quite obvious that the jury had honed in on the crucial issue of whether the presence of the marijuana found in the aircraft was sufficient circumstantial evidence to convince them beyond a reasonable doubt that that material was also the material in the boxes that had been removed. It is respectfully submitted that, under the peculiar circumstances of the instant case, it was not sufficient.

The government's own witness, Janice Holley, admittedly the leading authority on marijuana under government contract at the University of Mississippi for the study of same,

testified that the residue found on the airplane could have been grown in the United States and was two to five years old. It was further established without question that the Defendant, Webb McPherson, had obtained the uncleaned 1973 aircraft from a commuter airline some four months before. Therefore, despite the lengthy and complex trial of the case, the issue is very simple: Is the presence of a small amount of marijuana which is two to five years old on a 1973 aircraft purchased by one of the defendants only four months before sufficient circumstantial evidence to prove beyond a reasonable doubt that the boxes removed from the aircraft also contained marijuana? A careful analysis of circumstantial evidence cases will demonstrate that it is not.

The standard has been stated by our Third Circuit Court of Appeals in United States

v. United States Gypsum Co., 600 F.2d 414, 416-17(3rd Cir.), cert. denied, 444 U.S. 884, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979):

> "We must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the...decision. Burks v. United States, (437 U.S. 1, 17,) 98 S.Ct. 2141 (57 L.Ed.2d 1) (1978); Glasser v. United States, (315 U.S. 60, 80,) 62 S.Ct. 457 (86 L.Ed. 680) (1942)."

In applying this standard, the appellate court does not weight the evidence or determine the credibility of witnesses. United States v. Bycer, 593 F.2d 549 (3d Cir. 1979); United States v. Scarborough, 496 F.Supp. 1293 (Dist. Ct. ED Pa. 1980).

As stated by our Third Circuit, the evidence presented in a criminal trial, whether direct or circumstantial,

> does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the ...(fact finder) can find the defendant

guilty beyond a reasonable doubt. United States v. Cooper, 567 F.2d 252, 254 (3d Cir. 1977); United States v. Hamilton, 457 F.2d 95 (3d Cir. 1972).

Inferences from established facts are accepted methods of proof when no direct evidence is available. It is essential, however, that there be a logical and convincing connection between the facts established and the conclusion inferred. United States v. Bycer, supra. And although "the jury is permitted to infer from one fact the existence of another essential to guilty, if reason and experience support the inference", Tot v. United States,319 U.S. 463, 63 S.Ct. 1241, 1244, 87 L.Ed. 1519 (1943), it is well -settled that the Court cannot permit the jury to rely on conjecture or speculation in arriving at its verdict. United States v. Heithaus, 391 F.2d 810 (3d Cir. 1968); United States v. Cockerill, 366 F.Supp. 856 (S.D.Ill. 1973).

As the Court stated in Bycer:

> "Our careful review of the record in this case fails to disclose any substantial connection between the proved, non-exclusive psossession and the charged distribution. We are all too aware of the seriousness of the illegal drug traffic problem and the difficulty of prosecution in many cases. But we are not willing to abandon the protection designed to aid the innocent--requiring proof beyond a reasonable doubt, not simply suspicion--to sustain a conviction."

Thus, there is little question that circumstantial evidence may be the basis for a conviction and need not be inconsistent with every conclusion save that of guilt. However, it still must be sufficient to prove the guilt of the Defendant beyond a reasonable doubt. The government might argue that the marijuana found on the wing of the airplane undermines the defense theory that the marijuana had been in the plane for some time. In actuality, it is perfectly consistent with the boxes having

been unloaded from the nose cone and the interior of the aircraft. Obviously, if the marijuana was already there, some would have gotten on the boxes and have been left on the wing had the boxes been placed there momentarily. It is, therefore, respectfully submitted that the established fact of the presence of marijuana does not support the inference that there was marijuana present in the unloaded boxes. There is no "logical and convincing connection between the facts established and the conclusion inferred." Under the instant circumstances, the conviction of your petitioners constituted a denial of due process of law.

CONCLUSION

In this case, the aircraft may have indeed come from without the territorial limits of the United States. However, the cargo had been unloaded and the state police had secured

the aircraft. Under the facts, there was no danger of evidence being destroyed or moved. Thus there were no exigent circumstances requiring an immediate search. Nor is there a common standard or just cause for classifying this as a border search.

As to the presence of the marijuana, it is not being facetious to liken this to the purchase of any used vehicle or other means of transportation. If this conviction were to stand, one could be convicted of this offense if the previous owner or occupant had dropped some marijuana on the floor or some had spilled out in the luggage compartment. Surely to permit this judgment to stand constitutes denial of due process of law.

Respectfully submitted,

H. STANLEY REBERT, ESQ.
Counsel for Richard S. Aura

HAROLD N. FITZKEE, JR., ES
Counsel for John Webb McPherson

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5654
No. 84-5655

UNITED STATES OF AMERICA

v.

AURAND, RICHARD S.,
McPHERSON, JOHN WEBB,
Appellants

SUR PETITION FOR REHEARING

Before: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges.

The petition filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing before the Court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A. Leon Higgenbothom
Circuit Judge

Dated: April 22, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5654
No. 84-5655

UNITED STATES OF AMERICA

v.

AURAND, RICHARD S.,
McPHERSON, JOHN WEBB,
Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Nos. 83-00198-01 and 84-00002-01)
District Judge: Honorable R. Dixon Herman

Submitted Under Third Circuit Rule 12(6)
March 18, 1985
Before: SEITZ and HIGGINBOTHAM, Circuit Judges,
and GILES, District Judge*

JUDGMENT ORDER

This cause came on to be heard on the record

*Honorable James T. Giles, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on March 18th, 1985.

After considering the contentions raised by appellants, Richard S. Aurand and John Webb McPherson, to-wit, that the Court erred: (1) in denying appellants' pretrial motions; (2) in not directing a verdict of acquittal at the conclusion of the government's case on the theory of insufficiency of evidence to warrant conviction of importation and conspiracy; (3) in admitting hearsay statements implicating appellant McPherson, and (4) in not granting a mistrial when a witness responded to a question previously stricken by the court; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ A. LEON HIGGENBOTHAM

Attest:

/s/ Sally Mrvos
Clerk

DATED: March 25, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	Criminal Nos. 83-00198-01
	:	84-00002
vs.	:	
	:	
RICHARD S. AURAND and	:	
JOHN WEBB McPHERSON	:	

MEMORANDUM

On April 10, 1984, a jury found Defendants Richard S. Aurand and John Webb McPherson, guilty of importing marijuana and conspiring to import marijuana pursuant to 21 U.S.C. §§952, 963. Timely post-trial motions for a new trial were filed by Defendants, which the parties have briefed and we will now address.

I. SUFFICIENCY OF THE EVIDENCE

A. Legal Standard

Defendants assert that the Court erred in denying their motion for acquittal and that the verdict is not supported by substantial evidence. We agree with the Government that the same standard

of review governs both of these claims. This standard is expressed fully in a recent Third Circuit opinion, which is as follows:

> In reviewing the sufficiency of the evidence to support the convictions of (Defendants), we are mindful of the Supreme Court's decision in GLASSER v. UNITED STATES, 315 U.S. 60, 80 (1942). In GLASSER, the Court stated:
>
> > "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."
>
> Id. (citation omitted) Recently, the Court reaffirmed this holding. In BURKS v. UNITED STATES, 437 U.S. 1, 17 (1978), the Court stated:
>
> "The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. . . . Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. . . .While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear."

Id.(citations omitted). Moreover, "(t)he evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt." UNITED STATES v. ALLARD, 240 F.2d 840, 841 (3d Cir.), cert. denied, 353 U.S. 939 (1957). See also UNITED STATES v. COOPER, 567 F.2d 252, 253 (3d Cir. 1977) (recognizing the GLASSER and ALLARD standards). Finally, when examining the sufficiency of the evidence, the Court reviews the totality of the circumstances. See GOVERNMENT OF THE VIRGIN ISLANDS v. GREENE, 708 F.2d 113,115 (3d Cir. 1983), cert. denied, _____U.S. ____, 104 S.Ct. 1004 (1984); UNITED STATES v. BLASCO, 702 F.2d 1315, 1332 (11th Cir. 1983), cert. denied, _____U.S._____, 104 S.Ct. 275 (1984).

UNITE STATES v. LEON, No. 83-5208, slip op. at 11-12 (3d Cir. July 12, 1984) (emphasis added)[1]

In short, the question is whether the record evidence can reasonably support a finding of guilt beyond a reasonable doubt. As the Supreme Court stated:

> this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." WOODBY v. INS, 385 U.S. at 282, 17 L.Ed. 3d 362, 87 S.Ct. 483 (emphasis added). Instead, the relevant question is whether, after viewing the evidnece in the light most favorable to the prosecution, any rational trier of

> fact could have found the essential elements of the crime beyond a reasonable doubt. See JOHNSON v. LOUISIANA, 406 U.S. at 362, 32 L.Ed. 2d 152, 92 S.Ct. 1620. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conficts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crimecharged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

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[1]In reviewing the evidence, we recognize, as we so charged the jury, that the law makes no distinction between direct and circumstantial evidence. Notes of Testimony (N.T.) 8:54.

JACKSON v. VIRGINIA, 443 U.S. 307, 318-19 (1979) (emphasis in original) (footnotes omitted).

Examining the sufficiency of the evidence in this case, we find that the jury could have found the essential elements of importation of marijuana and conspiring to import marijuana beyond a

reasonable doubt.

B. The Facts

Aurand was the employee of McPherson. As McPherson's employee, Aurand piloted a Piper Seneca N1073U aircraft, which McPherson owned. N.T. 4:148-49, 2:33, Government's Exhibit 17. On October 21, 1983, Aurand and McPherson were observed at Baublitz Airport in Brogue, Pennsylvania, equipping the Piper for long distance travel. In particular, Defendants had removed the rear seats in the plane and were installing two fifty-five gallon drums, known as long-range fuel tanks. In the afternoon, Aurand and a co-pilot were observed departing the Baublitz airfield, with McPherson remaining behind. N.T. 4:85-91.

The plane was next sighted fifty-seven miles off the northwest coast of the Great Inagua island in the Bahamas, which is outside the waters or territory of the United States.

N.T. 2:46. From that point, the plane was followed nonstop for ten to twelve hours by United States Custom pilots, both visually and by radar, until the plane landed at the Baublitz Airport in Pennsylvania.

During this period, the plane did not land in the United States. N.T. 2:64-123. Testimony revealed that the plane had to have landed outside the United States, but before it was sighted off of Great Inagua, to refuel. N.T. 6:17-19. As the plane traveled, it flew over the water until it broke the coastline of South Carolina. N.T. 2:51-52. No flight plan had been filed previously. N.T. 2:48. These conditions were noted to be uncommon and more dangerous N.T. 2:64.

Another unusual activity occurred when Aurand failed to land at a designated airport and clear customs. A plane must clear customs, i.e., be checked for importation violations,

in Florida if the plane has been south of a certain latitude. N.T. 2:72-73. The Piper met this criteria but did not land at any airport to be inspected. Id.

Ultimately, Aurand filed a flight plan to land at the Glenn L. Martin Airport in Baltimore, Maryland. N.T. 2:51. Although the plane appeared to be descending to land, the landing was aborted and the plane continued to Baublitz Airport, a more remote and less safe airstrip. N.T. 2:54, 2:145-47, 2:157.

As the Piper approached Baublitz, the airfield lights were activated. At the time, it was dusk or dark. N.T. 2:147. As soon as the plane landed on the grassy strip, however, the airfield's and the plane's lights were extinguished. As the aircraft taxied to a building, its lights were blinked on and off a few times. N.T. 2:148-49. In the meantime, a customs plane attempted to land on the field;

unfortunately, the lights were turned off by someone on the airfield's lights but was prevented from doing so by manual control on the ground. N.T. 2:148-49, 4:97-102.

The plane was met by a few individuals, one individual being McPherson. N.T. 2:126-27, 4:54-55. The Piper was quickly unloaded. Witnesses on the ground observed numerous white packages being removed from the passenger, rear compartment, and nose locker storage area and being placed in nearby vehicles. N.T. 3:15, 17; 3:54-55. The packages did not appear to be difficult to carry. N.T. 3:15-16.

As the plane was being unloaded, the son of the owner of the airfield, with his two companions, stopped to check on the airfield. N.T. 4:50. The youth observed Aurand and stopped to talk with McPherson. N.T. 4:54-55. When he returned to his car, he appeared visibly upset and exclaimed, "Let's get the fuck out of here."

N.T. 3:21, 57. They then promptly left the scene. McPherson, Aurand, and the other individuals completed unloading the plane and immediately left Baublitz Airport. N.T. 2:128. The Piper was left at the spot, unattended, partially open, and not tied down. N.T. 2: 150-51, 4:63, 97.

A subsequent search of the plane revealed the presence of small amounts of marijuana in the rear passenger area, and the nose locker and on the wing of the plane. N.T. 3:71, 7: 25-26; Government's Exhibits 36 & 37. Janis Holley, the Project Coordinator and Laboratory Supervisor for a project concerning the growth and analysis of marijuana, testified that the marijuana found in the nose locker was not native to the United States and that the marijuana found in the passenger compartment area probably had the same origin as the nose locker marijuana sample. N.T. 6:81-82. Other

evidence recovered in the Piper plane included a flight plan dated October 22, 1983, which noted Aurand as the pilot; a map of the Caribbean-Puerto Rico-Jamaica-Bahama area; and handwritten notes with weight and balance calculations for the plane. See Government's Exhibits 7, 9, & 11; N.T. 3:90. Subsequent processing revealed that Aurand's and McPherson's fingerprints were on these items. N.T. 4:12-13.

Further testimony established that Wendy Ludwick, Aurand's fiancee at the time, telephonically assisted McPherson and Aurand in arranging the October 1983 weekend flight from Baublitz Airport.[2] McPherson told Aurand through Ludwick that Aurand was to have the plan ready for Friday (October 21, 1983) with the long-range fule tanks installed. N.T. 4:154-55.

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[2]Aurand had a hearing disability and, consequently, when he used Ludwick's telephone, he needed her assistance to hear the caller.

In the days following Aurand's return, Aurand told Ludwick that he had been to Jamaica the weekend of October 21-22, 1983, as part of his job. When previously explaining his employment to her, Aurand had told Ludwick that he worked for McPherson in the company Counter-Intelligence, Inc. His task was to pilot McPherson's Piper Seneca to Jamaica to catch drug smugglers.[3] N.T. 4:149, 167; 5:27. Concerning the October 1983 flight, Aurand told Ludwick that he had piloted the plane to and back from Jamaica in an attempt to appear like he was smuggling drugs. He had committed this "ruse", he explained to her, to try to catch custom officials taking bribes. N.T. 4:163-64.

Aurand further told Ludwick that another plane had followed him to the Baublitz Airport upon his return on October 22, 1983. This other plane could not land, he claimed, due to its

[3]Aurand also told others that he worked for Counter-Intelligence, Inc.; that McPherson was his employer; and that he piloted an aircraft in his job, which was to catch drug smugglers. N.T. 5:93-94, 5:115, 6:36-37, 7:62, 7:64, 7:65-66,7:68.

size. N.T. 4:164-65. He and others unloaded radio equipment from the plane, split up, then rejoined on a hearby hill and watched aircrafts circle over the air field. N.T. 4:166, 171.

Aurand also told Ludwick that government agents had questioned him about his actions for the two days (October 21-22, 1983). Aurand then tried to reach McPherson, and succeeded in arranging a meeting. N.T. 4:161. Aurand later asked Ludwick if he could stay with her. He said he could not go home because he would be questioned and he could not answer their questions. N.T. 4:162-63. When Ludwick subsequently told Aurand that agents had questioned her about him, Aurand told her to be careful what she said or she could send him to jail. N.T. 4:169.

Finally, the Government presented Customs and FBI Agents who testified that Aurand claimed the last time he had flown McPherson's plane was Thursday, October 20, 1983. N.T. 3:68. Never-

the less, in addition to other evidence, the Government produced Federal Aviation Administration (FAA) tapes from October 22, 1983, which contained Aurand's voice and his acknowledgment that he was piloting the Piper Seneca N1073U. See Government's Exhibits 28, 30; N.T. 5:97. Additionally, the Government produced an exculpatory statement made by McPherson. McPherson had told an individual, upon being queried about the events of October 21 and 22, 1983, that he did not know the pilot, Aurand. N.T. 6:60-61.

We concur with the Government that this evidence and the inferences therefrom support the jury's finding of guilt beyond a reasonable doubt. Defendants argue that while the evidence supports a finding that some illegal activity occurred, the evidence is insufficient to support a conviction of importation, which requires proof beyond a reasonable doubt that Defendants

possessed marijuana that emanated from outside the United States and that Defendants brought it into the United States. UNITED STATES v. WATKINS, 662 F.2d 1090 (4th Cir. 1981). In particular, Defendants claim that the finding of a small amount of marijuana residue in the plane and on the wing of the plane does not establish that the white boxes which were unloaded on October 22, 1983, contained marijuana.

We disagree. Although the Government's case was established wholly upon circumstantial evidence, the evidence and logical inferences support a finding that Defendants had imported a planeload of marijuana from outside the country. We believe the evidence establishes the essential elements of the crime beyond a reasonable doubt: that Aurand and McPherson conspired to import marijuana, that Aurand flew to Jamaica and picked up numerous boxes of foreign marijuana, that

Aurand flew back to the United States via a more dangerous route to evade Customs officials, that Aurand landed covertly at Baublitz Airport and wasmet by McPherson, and that the Defendants unloaded the marijuana cargo quickly and in the dark to avoid detection, leaving traces of marijuana behind. We thus deny Defendants' post-trial motion on the basis of the sufficiency of the evidence.

II. PRETRIAL MOTIONS

A. Search of the Piper Seneca Plane

Prior to trial, Defendants moved to suppress any evidence obtained in the searches of McPherson's abandoned Piper Seneca because government agents had not obtained search warrants. The Government countered that no warrants were necessary since the search was a "border search." In our February 23, 1984, memorandum, we observed that border searches were a valid exception to the Fourth Amend-

ment's warrant requirement. UNITED STATES v. RAMSEY, 431 U.S. 606, 622 (1977); ALMEIDA-SANCHEZ v. UNITED STATES, 413 U.S. 266, 273(1973) (warrantless search extends to the functional equivalent of a border search); UNITED STATES v. NIVER, 689 F.2d 520 (5th Cir. 1982). An evidentiary hearing was held to determine if the search constituted the functional equivalent of a border search. We subsequently held the search valid.

Defendants now contend that the denial of their suppression motion was error. Defendants do not offer any reason why the decision was error, other than Defendants' irrelevant discussion of warrantless automobile searches. They do note, however, that the Government "might argue that this was a 'border search'..." Defendants' Brief, at 14. The Government does, and always has, contended the search was the functional equivalent of a border search. The

pretrial evidentiary hearing expressly addressed that issue. The evidence overwhelmingly established that the Piper Seneca N1073U was observed outside the United States territory, followed non-stop from the Carribean, and first landed in the United States at Baublitz Airport. This is a prime example of the functional equivalent of a border search. UNITED STATES v. GARCIA, 672 F.2d 1349, 1363-64 (11th Cir. 1982).[4] Accordingly, we find no error in our refusal to suppress evidence.

B. Severance of McPherson

McPherson alleges error in the Court's refusal to grant his motion for severance. We find no error.

As we previously held:

(a) defendant must make a strong showing of compelling or substantial prejudice to

[4]Defendants' reliance upon UNITED STATES v. CARAWAY, 474 F.2d 25 (5th Cir. 1974), is totally misplaced for the reasons set forth in the Government's Opposing Brief, at 10.

> obtain relief. UNITED STATES v. WERNER 620 F.2d 922, 928 (2d Cir.1980); UNITED STATES v. STALLER, 616 F.2d 1284, 1294 (5th Cir.), cert. denied, 449 U.S. 369 (1980). A showing that a defendant may have a better chance of acquittal in separate trials does not establish prejudice requiring severance. UNITED STATES v. THOMAS, 676 F.2d 239, 243 (7th Cir. 1980); PETERSEN, supra. See also UNITED STATES v. FUEL, 583 F.2d 978, 988 (8th Cir. 1978), cert. denied, 439 U.S. 1127 (1979). Severance should not be granted if the jury is able to make individual determinations about guilt for each defendant based upon the evidence. UNITED STATES v. BRIGHT, 630 F.2d 804, 813 (5th Cir. 1980). The Third Circuit has also observed that severance should not be granted merely because the Government's case is stronger against a co-defendant, UNITED STATES v. DANSKER, 537 F.2d 40 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

UNITED STATES v. AURAND, No. 83-00198-01, slip op. at 7 (M.D. Pa. February 23, 1984).

McPherson contends that he suffered "great prejudice" in not being severed from Aurand. In support thereof, McPherson merely claims that statements made by Aurand suggested McPherson's prominence in the matter. McPherson

does not detail which statements prejudiced him or the manner of the prejudice. Nevertheless, any statements that implicated McPherson were properly admitted under appropriate evidentiary standards. Therefore, we find that McPherson has not made the necessary showing of substantial prejudice.

III. WENDY LUDWICK'S HEARSAY TESTIMONY

McPherson also argues that the Court erred in admitting Ludwick's testimony concerning statements made by Aurand that implicated McPherson. McPherson again fails to specify the statements made by Ludwick which allegedly prejudiced him.

The law is clear that hearsay is inadmissible if it does not fall within one of the exceptions to the hearsay rule. UNITED STATES v. REYNOLDS, 715 F.2d 99 (3d Cir. 1983); Fed. R. Evid. 802, 803. In the case at bar, Ludwick

repeated statements made by Aurand that implicated McPherson. These statements were properly admitted under Fed. R. Evid. 801(d)(2)(D) and (E). These rules of evidence provide that statements by a co-conspirator of a party during the course and in futherance of a conspiracy and statements by an agent within the scope of his agency or employment made during the existence of the relationship are not hearsay and are admissible.

During the trial, Ludwick testified that Aurand had told her and others that he was employed by McPherson as a pilot. He said he flew for McPherson to chase drug smugglers off the coast of Jamaica in conjunction with the Drug Enforcement Agency (DEA). N.T. 4:149, 167; 5:27. His salary for this work was $35,000.00 to $45,000.00 per year in July 1983, which Aurand said increased to $70,000.00 per year

in September 1983. N.T. 1:152. Prior to the weekend of October 21 and 22, 1983, Aurand said he would be taking a trip for his boss, McPherson. N.T. 4:153. Aurand and McPherson discussed and arranged the trip by telephone in Ludwick's presence. Indeed, Ludwick was a party to these conversations due to Aurand's hearing disability. N.T. 4:154-55. McPherson told Aurand to be at the Baublitz Airport Friday morning (October 21, 1983), to take out the seats in the plane, and to install the long-range fuel tanks. N.T. 4:156-57.

After being questioned by government agents on October 23, 1983, Aurand told Ludwick that he was going to meet with McPherson at Hunt Valley. N.T. 4:161-62. Later, Aurand said the reason for his trip to Jamaica was to catch custom officials accepting bribes. N.T. 4:163-64.

Reviewing these statements, we believe all were properly admitted either as co-conspirator

statements made in furtherance of the conspiracy, statements of an agent within the scope of his employment, or admissions. In part, Aurand explained his employment to Ludwick. Other statements demonstrated the conspiracy between Aurand and McPherson and their attempts to conceal it. Finally, other statements were admissions by McPherson made directly to Ludwick. Therefore, no error resulted in the admission of Ludwick's testimony.

IV. THE CHARGE TO THE JURY

Defendants assert that the Court erred in rejecting Defendants' proferred points for charge. Once again, Defendants have failed to articulate their position other than a general statement concerning whether the marijuana found in the plane was sufficient evidence upon which to convict. Thus, we focus on only that part of the charge.

Defendants' requested points 3 and 4, which concerned the discovered marijuana, were the equivalent of asking for a directed verdict and we, thus, properly, denied these points.[5] The remaining points concerning the marijuana, requested points 2, 5, and 6, were given to the jury, although not in the exact wording suggested by Defendants. Such is not error. In its charge, the Court reviewed the elements of the crime. N.T. 8:54-55. The Court further charged that it was the jury's role to determine by circumstantial evidence whether the boxes contained marijuana. N.T. 8:73. Accordingly, we find Defendants' protestations to be without merit.

---

[5]The requested points were as follow:

> 3. A small amount of residue of marijuana which is very old or has been subjected to harsh storage conditions is insufficient to establish beyond a reasonable doubt that the defendants engaged in the importation of marijuana on October 21, 1983.
>
> 4. A small amount of residue of marijuana which is very old or has been subjected to harsh storage conditions is insufficient to establish the corpus delicti of importation of marijuana.

V. MISTRIAL MOTION

Prior to Wendy Ludwick's testimony, a sidebar occurred. During this sidebar, the Court held that Ludwick could not testify as to specific large amounts of cash she had seen Aurand possessing, although she could testify as to his salary. N.T. 4:145-46. The prosecutor followed the Court's direction on this point during direct examination.

The following day during redirect examination the prosecutor requested a sidebar and asked permission to question Ludwick as to whether she had ever seen Aurand possessing large amounts of cash. N.T. 5:29. Following a discussion, the Court permitted the questioning. N.T. 5:29-30. The following exchange occurred:

Q: Miss Ludwick, did you ever see the defendant (Aurand) in possession of large amounts of cash?

A: Yes.

Q: On how many occasions?

A: Twice

Q: Do you recall how much money you saw?

A: I never counted, one time he said it was five thousand dollars and one occasion he said it was ten thousand dollars.

Q: Do you recall when those occasions were?

A: The one time was just when I met Mr. McPherson, the other time I don't remember exactly when it was.

MR. FITZKEE: Your Honor, I object...

N.T. 5:30-31. The Court immediately struck the references to specific amounts because Ludwick did not personally know the amount of money. Id.

Shortly thereafter in chambers, McPherson's counsel renewed his motion for a mistrial on the basis that the prosecutor had violated the court's prior direction that the Government not elicit the exact sums of cash. N.T. 5:35. The prosecutor stated that she believed the prior day's restriction had concerned only the fact that Aurand had told Ludwick that he had received $5,000 and $10,000 in cash from McPherson. N.T. 5:36. While hindsight reveals that the

prosecutor's recollection was faulty, we do not find her actions intentional. We find no misconduct and no basis to support a mistrial.

VI. GOVERNMENT'S EXHIBITS

In an absolutely frivolous post-trial motion, Defendants maintain that it was error for the Court to submit the Government's exhibits to the jury. The sum total of their claim is: "Although the admission of evidence and exhibits is within the sound discretion of the trial judge, objections were timely filed and overruled. Such was error." Defendants' Brief, at 23.

The Government's response, which is not surprising, is that it is at a loss to respond to this argument without any supporting authority or reasoning. We share the Government's position. We see no error or prejudice in submitting properly admitted evidence to the jury. Accordingly, Defendants' claim of error is soundly rejected.

R. DIXON HERMAN
UNITED STATES DISTRICT JUDGE

Dated: August 31, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Criminal Nos. 83-
	:	00198-01
	:	84-00002
RICHARD S. AURAND and	:	
JOHN WEBB McPHERSON	:	

O R D E R

AND NOW, this 31st day of August, 1984, in accordance with the accompanying memorandum, IT IS HEREBY ORDERED that Defendants' post-trial motion for a new trial is denied.

IT IS FURTHER ORDERED that Defendants, Richard S. Aurand and John Webb McPherson, will be sentenced on September 14, 1984, at 10:00 a.m. in Courtroom 1, Ninth Floor, Federal Building, Harrisburg, Pennsylvania.

R. DIXON HERMAN
UNITED STATES DISTRICT JUDGE